Supreme Court, U.S.
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In The
Supreme Court of the United States

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ROBIN L. TUTTLE,
Petitioner,

v.

MISSOURI DEPARTMENT OF AGRICULTURE,
Respondent.

– ♦ –

Petition for a Writ of Certiorari To the United States Court of Appeals For the Eighth Circuit

– ♦ –

PETITION FOR A WRIT OF CERTIORARI

– ♦ –

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an ADEA plaintiff in a reduction in force is required to prove, for the prima facie case, anything beyond (1) the plaintiff was within the protected age group under the ADEA, (2) the plaintiff was adversely affected by the employer's decision, (3) the plaintiff was qualified for the existing or another position at the time of his or her discharge, and (4) the employer did not treat age neutrally or younger workers were retained in substantially the same position.

2. Whether an ADEA plaintiff in a reduction in force who has made a prima facie case of age discrimination establishes pretext, per se, by establishing that the company deviated from its written layoff policies in terminating only plaintiff and other age-protected employees, and by contradicting the company's claim that terminating plaintiff saved money, and by establishing that plaintiff was as qualified as younger, less senior workers in substantially the same position.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties listed in the caption of the case in this Court, John Saunders and Charles Ausfahl were parties in the proceedings in the United States Court of Appeals for the Eighth Circuit. Mr. Saunders and Mr. Ausfahl were appellees in the court below.

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OPINIONS AND ORDERS IN THE COURTS BELOW

The March 26, 1999 opinion of the Court of Appeals, whose judgment is sought to be reviewed, is reported at 172 F.3d 1025 (8th Cir. 1999), and is reprinted in the Appendix to this Petition, pp. B-R. The April 28, 1999 opinion of the Court of Appeals denying rehearing is unreported and is reprinted in the Appendix to this Petition, p. A. The prior opinion of the United States District Court for the Western District of Missouri, entered January 29, 1998, in Case No.96-850-CV-W-8, is unpublished, and is reprinted in the Appendix to this Petition, pp. S-U.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1999. The order of the Court of Appeals denying rehearing was entered on April 28, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The ADEA makes it unlawful for any employer:

"to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623 (a)(1).

STATEMENT OF THE CASE

Petitioner Robin Tuttle, a long–time grain inspector for the Missouri Department of Agriculture, sued the Department and the Director of the Department's Grain Inspection Division following his termination in a reduction in force on December 31, 1995. Petitioner alleged that the Department had discriminated against him because of his age under the ADEA, 29 U.S.C. § 623, and alleged that Director Ausfahl retaliated against him because petitioner spoke out about the Director's mismanagement of the Grain Inspection Division ("the Division"). The jury found for petitioner and further found that this age discrimination was willful, and awarded petitioner liquidated damages.

Petitioner provided official grading and sampling of grain for the United States Department of Agriculture pursuant to the Division's contract with the USDA. This grain grading and sampling are the primary job functions of Grain Inspectors I and Grain Inspectors II. Petitioner met

the job qualifications for an Inspector II, and was 51 years old when he was terminated, effective December 31, 1995.

The reason given at that time, and offered at trial as a legitimate, non-discriminatory explanation for petitioner's termination, was that plaintiff was too expensive. The jury viewed this explanation with disbelief and as pretext for age discrimination after hearing evidence (a) that petitioner was actually cheaper than younger and less qualified inspectors who were not laid off, (b) that the Department never performed a cost-benefit analysis on plaintiff, and (c) that laying off petitioner actually drove up costs because the Department had additional costs of travel, travel time and expenses in shuffling employees into the Kansas City Service Point where petitioner had worked.

The jury also learned that Charles Ausfahl, the Director of the Grain Inspection Division and the decisionmaker, falsely promised petitioner that he would be considered for a promotion just weeks before his termination. Then petitioner's testing for further grain licenses was put on hold. No other inspector was treated similarly. Even after the Division did allow Petitioner to resume preparation for additional grain licensing in the fall of 1995, his test was then inexplicably cancelled. No other inspector was treated similarly. Petitioner then was terminated in December 1995. When some in management

sought to bring petitioner back to work, the decisionmaker falsely stated to management that once petitioner was laid off, he could not be reinstated.

The jury also learned that the Division had not followed its layoff policy in terminating petitioner. The Division's layoff policy was introduced into evidence at trial and required the Division to let go part time workers (called Grain Samplers) before laying off any full time employees (Inspectors). According to the former Program Administrator's memorandum to Defendant Ausfahl,

> "Grain Inspector I and Grain Samplers are a single, multiple title class so if we are going to lay off in that level, we are probably looking at lay-offs in reverse order of service credit score from those two combined rather than either one individually as a class."
>
> (Trial Exhibit 9).

Because of his years of service, petitioner's service credit score was higher than any part timers. Despite this policy, the Division did not lay off any part timers when petitioner was terminated.

REASONS FOR GRANTING THE WRIT

The judgment of the United States Court of Appeals for the Eighth Circuit should be reviewed by this Court because of the confusion in the various federal circuits regarding the proper elements of a prima facie case for an age discrimination plaintiff in a reduction in force (RIF). Some courts compare the ADEA plaintiff to workers in the same position, other courts to workers in substantially the same position, and others, like the Eighth Circuit, require an "additional showing" of age discrimination. These courts have demonstrated difficulty in applying these various elements, as well as articulating them.

This Petition provides this Court with an opportunity to set forth the proper elements of a prima facie case in a reduction in force: (1) the plaintiff was within the protected age group under the ADEA, (2) the plaintiff was adversely affected by the employer's decision, (3) the plaintiff was qualified for the existing or another position at the time of his or her discharge, and (4) the employer did not treat age neutrally or younger workers were retained in substantially the same position.

Direction from this Court on the elements of the prima facie case will assist cases at all phases of litigation. For petitioner, such direction is beneficial because the jury

viewed the employer's proffered non-discriminatory explanation with disbelief. Petitioner is entitled to reinstatement of the jury's verdict because the factfinder's rejection of the defendant's proffered reason, together with proof of the elements of the prima facie case, suffice to show intentional discrimination; the jury was permitted to infer the ultimate fact of intentional discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-11, 113 S.Ct. 2742, 2749 (1993). As such, the proper elements of the prima facie case are critical to petitioner.

A corollary issue for this Court concerns the nature of a reduction in force. At trial, the employer presented evidence of financial difficulties and suggested that eliminating plaintiff would cut costs. The Eighth Circuit incorrectly held that, for a reduction in force, the employer need only present evidence of a financial downturn, and therefore disagreed with the jury's rejection of the employer's explanation that plaintiff was too expensive and less versatile than other employees.

The business decision to eliminate workers for economic reasons ("rightsizing", in current corporate parlance) merely identifies the adverse employment action. Because the Eighth Circuit lacked guidance from this Court, it accepted the employer's evidence of a financial

downturn as the end of the inquiry. The intermediate court refused to examine the employer's motive further, for fear of second guessing the employer.

The Eighth Circuit's approach conflicts with that taken by other federal circuits. These other decisions differentiate between a sweeping RIF, such as a plant closing or elimination of a company division or product, and an individualized job reduction in which the company's services and market orientation do not change. For this latter circumstance, which includes the petitioner's fate, an explanation from the employer on why one employee was selected for termination before another is required. The Eighth Circuit erred in not requiring or examining the employer's explanation.

The Prima Facie RIF Case.

While the elements of a prima facie case of age discrimination pursuant to the ADEA are universal and standard, [see O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312, 116 S.Ct. 1307 (1996)] this consistency evaporates when the lower courts are confronted with a reduction in force. The Circuits are fairly uniform only on two elements of a RIF: that the plaintiff was within the protected age group under the

ADEA, and that the plaintiff was adversely affected by the employer's decision.

The remaining elements are varied and inconsistent. The First Circuit requires a RIF plaintiff to establish that he or she met the employer's legitimate job performance expectations, and that the employer did not treat age neutrally or younger persons were retained in the same position. Brennan v. GTE Government Systems Corp.,150 F.3d 21, 26 (1st Cir. 1998). The Fourth Circuit looks for evidence that, at the time of discharge, the plaintiff was performing at a satisfactory level, and that comparably qualified persons outside the protected class were retained in the same position or that the employer did not treat age neutrally in deciding to dismiss the plaintiff. Blistein v. St. John's College, 74 F.3d 1459, 1467, 1470 (4th Cir. 1996). The Fifth Circuit requires a RIF plaintiff to present evidence that he or she was qualified to assume another position at the time of the discharge or demotion, and evidence from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching its decision. Woodhouse v. Magnolia Hosp., 92 F.3d 248, 252 (5th Cir. 1996). In the Sixth Circuit, a plaintiff must establish that he or she was qualified for the position held, and that age was a factor in eliminating that position, or, where some employees are shifted to other

positions, that the plaintiff were qualified for another position, he or she was not given a new position, and that the decision not to place the plaintiff in a new position was motivated by their age. Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121, 1126 (6th Cir. 1998). The Eleventh Circuit will accept evidence that the plaintiff was qualified for his or her own position or another position at the time of discharge and evidence from which a rational factfinder could conclude that the employer intended to discriminate against him or her in making the discharge decision. Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 1331 (11th Cir. 1998). The Eighth Circuit required petitioner to show he satisfied the applicable qualifications for his job and some "additional showing" that age was a factor in his termination. Appendix at page G.

These varying elements for a reduction in force provide more confusion than guidance. Because a RIF may close an entire plant or may eliminate only a few workers, a flexible standard is required. These needs are met by requiring a RIF plaintiff to establish that he or she was qualified for the existing or another position at the time of his or her discharge, and that the employer did not treat age neutrally or younger workers were retained in substantially the same position.

Comparison of similar jobs is appropriate, because of circumstances like the petitioner's, where the employee's job title is eliminated, but the employee is actually more qualified than other, younger employees to hold a similar position which is not eliminated. This is an appropriate consideration. "[W]e have considered as relevant for comparison non-protected employees with similar, though not identical, job functions and titles to those of the older employees." Burger v. New York Institute of Technology, 94 F.3d 830, 833 (2nd Cir. 1996). This is especially true for circumstances like the petitioner's, where his job duties were not eliminated when his job title was.

Pretext in the RIF Case.

Expression and crystallization of the prima facie elements of a RIF also serves to bring the employer's burden of production into better focus. For reductions in force at opposite extremes – a plant shut down versus termination of a single employee – the legitimate, non-discriminatory explanation will be quite different. Under either scenario, guidance on the elements of the prima facie case will allow employers to consider their actions accordingly.

In cases like the petitioner's, the employer's explanation must be individualized:

> [W]hat is suspicious in reduction-in-force cases is that the employer fired a qualified, older employee but retained younger ones. If we focus not on why employees, in general, were discharged . . . but instead on why the plaintiff rather than another employee was discharged, the discharge of an older employee rather than a younger one is initially unexplained. Under these circumstances, requiring the employer to articulate reasons for his decision to fire the plaintiff is appropriate.
>
> Woodhouse v. Magnolia Hosp., *supra*, 92 F.3d 248, 253.

The Eighth Circuit's philosophy for a reduction in force involved merely an analysis of whether the employer was losing money for some undefined period of time. Appendix, at pp N-O. This philosophy conflicts with the approach of the Fifth Circuit and other federal circuits, and does not consider why a particular employee was let go while another was retained.

If the Eighth Circuit had appropriately proceeded to assess the employer's reason for terminating petitioner – that petitioner was too costly for the work he performed – it

would have learned that the jury heard evidence that the employer had failed to follow its written layoff policy in terminating petitioner, that the petitioner was actually cheaper than younger and less qualified inspectors who were not laid off, that the Department never performed a cost-benefit analysis on petitioner, and that laying off petitioner actually drove up costs because the Department had additional costs of travel, travel time and expenses in shuffling employees into the Kansas City Service Point where petitioner had worked.

CONCLUSION

Regardless of the future direction of the national economy, reductions in force will continue. For both workers and employers, guidance from this Court on what constitutes a prima facie case of age discrimination in a reduction in force is welcome. So too, guidance on what constitutes a legitimate, non-discriminatory explanation for terminating an employee within the protected age class is welcome, whether that reduction in force is a plant closing or the termination of one employee.

For the foregoing reasons, the petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Certificate of Service

The undersigned member of this Court certifies that on this 27TH day of July, 1999, he has placed three copies of this Petition in the United States mail, postage pre-paid and properly addressed to the following counsel for respondent in the court below:

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Patrick J. Doran

APPENDIX

Order of the Court of Appeals for the Eighth Circuit denying rehearing entered on April 28, 1999_____A

Opinion of the Court of Appeals for the Eighth Circuit entered on March 26, 1999_____B-R

Judgment of the United States District Court for the Western District of Missouri entered on January 29, 1998 _____S-U

Text of 29 U.S.C. Section 623 (a) (1-2) _____V

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-1686

Order Denying Petition for Rehearing
and for Rehearing En Banc

Robin L. Tuttle,
Appellant,

v.

Missouri Department of Agriculture, et al.,
Appellees.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

April 28, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-1686

Appeal from the United States
District Court for the Western
District of Missouri.

Robin L. Tuttle, Appellant,

v.

Missouri Department of Agriculture; John L. Saunders, Director, Missouri Department of Agriculture; Charles Ausfahl, Director of Grain Inspector of Division of Missouri Department of Agriculture, Appellees.

Submitted: November 16, 1998

Filed: March 26, 1999

Before MCMILLIAN, FLOYD R. GIBSON and HANSEN, Circuit Judges.

FLOYD R. GIBSON, Circuit Judge.

This case concerns Robin Tuttle's claim that his former employer, the Missouri Department of Agriculture (Department), discriminated against him on the basis of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 (1994), and Tuttle's claim that two of his former supervisors, Charles Ausfhal and John Saunders, violated his right to free speech by terminating him for speaking out on matters of public concern, in violation of 42 U.S.C. § 1983 (1994).

Following a jury verdict in Tuttle's favor on both claims,[1] the district court[2] granted the Department's and Ausfhal's (collectively "the defendants") motion for judgment as a matter of law (JAML). Tuttle appeals the district court's order. For the reasons set forth below, we affirm the district court.

I. BACKGROUND

Robin Tuttle had been employed as a Grain Inspector, Class I, with the Department's North Kansas City branch of the Grain Inspection Program for twenty-three years at the time of his termination in December of 1995. Tuttle was terminated as part of a reduction-in-force (RIF). Tuttle was fifty-one years of age at the time of his termination.

The Grain Inspection Program (Program) is the official designee of the United States Department of Agriculture's Federal Grain Inspection Service. As such, the Program is authorized to perform official federal grain weighing and grading. To qualify as an official grain grading agency, the Program must be operated on a fee-funded basis[3] and must utilize a merit, rather than patronage, system.

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[1] The jury found in favor of John Saunders on the §1983 claim. The jury's disposition of that claim is not at issue on appeal.

[2] The HONORABLE JOSEPH E. STEVENS, late a United States District Judge for the Western District of Missouri.

[3] A fee-funded agency is one which generates its income based upon fees paid for its services, rather than receiving general appropriations from the state.

The Program utilizes six employee classifications: Grain Sampler, Grain Inspector I, Grain Inspector II, Grain Inspector III, Grain Inspector IV, and Grain Inspector V.[4] Grain Samplers are part-time employees whose main duties are sampling grain and transporting grain to a licensed grain grader. Grain Inspector Is are full-time regular employees who perform essentially the same function as Grain Samplers. Grain Inspector IIs are also full-time regular employees whose main duties are sampling and grading grain. Grain Inspector IIs must have a grain grading license to qualify for this position. At some point after Tuttle was hired, the Program stopped hiring Grain Inspector Is.[5]

Between March of 1993 and June of 1996, the Program sustained losses of $1,200,000. In an effort to cut costs, the defendants eliminated the entire class of Grain Inspector Is at the North Kansas City branch in December, 1995. Five Grain Inspector Is were terminated as part of the RIF. Tuttle and the other Grain Inspector Is were invited to stay on with the Department as part-time Grain Samplers with decreased hours, pay and benefits. Tuttle rejected the Department's offer. All of the Grain Inspectors Is terminated in the RIF were over the age of forty and had been with the Department for a number of years.

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[4] Only the responsibilities of Grain Samplers, Grain Inspector Is, and Grain Inspector IIs are pertinent to this case.

[5] The Program stopped hiring Grain Inspector Is because they were the least flexible of the employment classifications. See Tr. at 80.

On August 12, 1996, Tuttle commenced this action against the Department, alleging that his termination violated the ADEA.[6] Several months later, Tuttle amended his complaint to include Ausfhal and Saunders as defendants. In his amended complaint, Tuttle alleged that Ausfhal and Saunders had terminated him because, in the summer of 1995, he had spoken out on matters of public concern. Thus, Tuttle charged the defendants with violating his First Amendment right to free speech.[7]

On August 13, 1997, the defendants filed a motion for summary judgment with the district court. Tuttle responded to the motion on September 11, 1997. The district court did not rule on the motion prior to trial but took the motion under advisement. See Tr. at 91, 369-70. On October 20, 1997, the case proceeded to trial. Following the presentation of Tuttle's evidence, and again at the close of all the evidence, the defendants moved for JAML. See id. at 369. App. at 22-24. The district court overruled the motion and allowed the case to go to the jury.

On October 23, 1997, the jury returned a verdict for Tuttle on his ADEA claim, finding that the Department had acted willfully in terminating him. On the § 1983 claim, the jury found for Tuttle and against Ausfhal. On October 30, 1997, the defendants filed a renewed motion for JAML, or

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[6] Tuttle's First and Second Amended Complaint included an ERISA claim and a Missouri Human Rights Act claim. The district court dismissed these claims in its order of August 25, 1997. See Appellee's Supplemental App. at 44-50.

[7] Tuttle further alleged that his association with his step-daughter, whom defendants believed held stock in a company which competed with the Department, also played a role in his termination. As Tuttle appears to have abandoned his claim that the Department violated his right to freedom of association on appeal, this claim merits no discussion.

in the alternative, a request for a new trial. On January 29, 1998, the district court granted both of the defendants' motions. The district court held that "no reasonable jury could have returned verdicts in favor of Tuttle." App. at 22-24. This appeal ensued.

II. DISCUSSION

Tuttle argues that the district court erred by concluding that the evidence at trial was legally insufficient to support the jury's verdict. We review a grant of JAML de novo, applying the same standard as the district court. See Sims v Sauer-Sundstrand Co., 130 F.3d 341, 343 (8th Cir. 1997); Krumwiede v. Mercer County Ambulance Serv. Inc., 116 F.3d 361, 363 (8th Cir. 1997). Accordingly, in our review we must consider the evidence in the light most favorable to Tuttle, assume that all evidentiary conflicts were resolved in favor of Tuttle and that Tuttle's evidence is true, and give Tuttle the benefit of all favorable inferences which may reasonably be drawn from the facts. See Clements v. Gen. Accident Ins. Co. of America, 821 F.2d 489, 491 (8th Cir. 1987). We will uphold the district court's grant of JAML only if reasonable minds could not differ from the evidence. See id. Furthermore, "all the evidence must point one way and be susceptible of no reasonable inference sustaining the position of [Tuttle]." Jarvis v. Sauer Sundstrand Co., 116 F.3d 321, 324 (8th Cir. 1997) (internal quotation omitted). Although Tuttle is entitled to the benefit of all reasonable inferences, "we may not accord him the benefit of unreasonable inferences." Hopper v. Hallmark Cards. Inc., 87 F.3d 983, 988 (8th Cir. 1996) (internal quotation omitted).

A. ADEA CLAIM

As Tuttle's claims are based largely on circumstantial evidence, the familiar burden-shifting scheme developed by the Supreme Court in McDonnell Douglas Corp. v. Green,

411 U.S. 792, 800-04 (1973), applies to this case. This three-step analysis first requires that Tuttle present a prima facie case of discrimination. Once Tuttle puts forth evidence sufficient to satisfy his prima facie case, a legal presumption of unlawful discrimination is created. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). The burden of production then shifts to the Department to articulate a legitimate non-discriminatory reason for the adverse employment action. If the Department identifies a legitimate non-discriminatory reason for its action, the burden of production then rests with Tuttle. At that point, Tuttle must show that the employer's proffered reason is pretextual and that "he has been the victim of intentional discrimination." Id. at 508 (internal quotation omitted). The burden of proof at all times remains with Tuttle. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). To establish a prima facie case of age discrimination in a RIF context, Tuttle must show that he was in the protected age group,[8] that he satisfied the applicable job qualifications, that he was discharged, and produce some additional showing that age was a factor in his termination. See Herrero v. St. Louis Univ. Hosp., 109 F.3d 481, 483-84 (8th Cir. 1997). While it is clear that Tuttle has met the first three elements, we are doubtful that the "additional showing" element has been satisfied. Nonetheless, for the purposes of this appeal, we will assume that Tuttle sufficiently established each element of his prima facie case. See Lewis v. Aerospace Community Credit Union, 114 F.3d 745, 749-50 (8th Cir. 1997), cert. denied, 118 S.Ct. 1392 (1998) (comparing lesser evidentiary standard necessary to establish prima facie case with that necessary to rebut nondiscriminatory explanations); Holley v. Sanyo Mfg, Inc., 771 F.2d 1161, 1165-68 (8th Cir. 1985) ("we [should] not be overly rigid in

[8] The ADEA protects individuals who are at least forty

our consideration of the evidence of discrimination a plaintiff may offer" to establish the "additional showing.").

As we have assumed that Tuttle established his prima facie case, we turn now to the Department's proffered explanation for Tuttle's termination. The Department contends that its termination of Tuttle was part of a cost-reducing RIF necessary for the Program's continued economic viability. The non-discriminatory reason advanced by the Department effectively rebuts the presumption of discrimination created by Tuttle's prima facie case. At this point, we focus our review on the ultimate factual issue: whether the Department intentionally discriminated against Tuttle based upon his age. See Feltmann v. Sieben, 108 F.3d 970, 975 (8th Cir. 1997), cert. denied, 118 S. Ct. 851 (1998); Serben v. Inter-City Mfg. Co., Inc., 36 F.3d 765, 766 (8th Cir. 1994) (per curiam).

Tuttle contends that he presented sufficient evidence from which a jury could reasonably infer that his termination was the product of age discrimination. Tuttle points to several pieces of evidence which allegedly belie the Department's proffered rationale for his termination.

Tuttle first claims that the defendants had a pattern of forced early retirement. Tuttle presented evidence at trial that Ausfhal, in a May 30, 1995 meeting, stated that the Department needed to find a way for more personnel to "retire" because of the Department's financial situation. See Notes of SPM's Meeting (May 30, 1995), App. at 61. Trial Ex. 18. Tuttle argues that, because the Department had no voluntary early retirement program available to employees at the time that Ausfhal made the statement, the jury could reasonably have inferred that the RIF was a ploy by the defendants to enforce an involuntary early retirement program. We disagree.

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years of age. See 29 U.S.C. § 631 (1994).

As we have previously noted, "an employer's offer of voluntary 'early retirement to other protected employees does not violate the ADEA and does not support an inference of age discrimination.'" Reynolds v. Land O'Lakes. Inc., 112 F.3d 358, 363 (8th Cir. 1997) (quoting Serben, 36 F.3d at 766); see also Thomure v. Phillins Furniture Co., 30 F.3d 1020, 1024-25 (1994) (employer's statement to plaintiff that he could quit if he did not like the salary cuts implemented during an economic downturn insufficient evidence of age animus to sustain jury verdict). The evidence presented by Tuttle is even less probative of age animus. We cannot say that the mere fact that at a management meeting, in which the financial situation of the Department was discussed, a supervisor's statement that the retirement of personnel would be beneficial to the Department's finances indicates a discriminatory animus.

Tuttle next alleges that the defendants preferred younger employees. As evidence of this preference, Tuttle relies largely on his own observations.[9] However, Tuttle's speculation regarding the reasons for his termination, without more, will not suffice to support a reasonable inference of age discrimination.[10]

Tuttle also relies on the testimony of Steve Bell, the Program's former state-wide Program Administrator. Bell testified that: 1) most of the Grain Inspector IIs are newer employees with less experience than Tuttle; 2) if Tuttle were grouped with the Inspector IIs, he would have more

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[9]Tuttle's testimony on this topic consists of the following:

Q. In the recent years before you were laid off in December 1995, did you see a trend in the division toward younger workers?

A. Yes

Q. Did you see any favortism [sic] toward those younger workers as far as promotions and advancements?

* * *

A. Seems like they advanced quicker.

Q. Do you believe that your age was a factor in being laid off?

A. Yes, I do.

Tr. at 303-04.

[10] This Court has noted that circumstantial evidence "such as a demonstration of a preference for younger employees" could provide the "additional showing" necessary to establish a prima facie case in the ADEA - RIF context. Holley, 771 F.2d at 1166 (emphasis added). However, we do not construe our holding in Holley to mean that any protected employee who is terminated in a RIF need only allege that a preference for younger employees exists in order to establish the reasonable inference of discriminatory animus necessary to survive a summary judgment motion or sustain a jury verdict

seniority than most of the Inspector IIs; 3) a significant number of Inspector IIs are not younger than Tuttle; 4) that some Inspector IIs have done less grain grading and have less seniority than Tuttle. See Tr. at 61, 63, 64, 69. The fact that many Grain Inspectors IIs had less experience and seniority than Tuttle does not reasonably create an inference that the Department's decision to eliminate the entire class of Grain Inspector Is was motivated by any discriminatory purpose. We cannot say that an employer's decision to reduce its payroll costs by eliminating the least versatile class of employees, whose work could be distributed to lower-paid part-time employees, is sufficient evidence to support a finding of age discrimination. See Thomure, 30 F.3d at 1025 ("We will not substitute our judgment for the business judgment of the [employer] and declare that [the employer] should have managed its financial crisis differently").

Tuttle next alleges that he presented evidence of the Department's refusal to promote older employees. Tuttle argues that the fact that he was qualified for the position of Grain Inspector II and was not promoted to that position creates an inference of age discrimination. We must again disagree. According to testimony at trial, the Program was not filling any vacant Inspector II positions due to its poor financial condition. See Tr. at 203; App. at 81. The Department's decision to eliminate one class of employees as a cost-saving measure and not to promote one of the affected employees to another full-time position does not create a reasonable inference of age discrimination.

Tuttle also relies on statistical evidence to support his claim of age discrimination. Tuttle alleges that, as each member of the class of Grain Inspector Is affected by the RIP were over the age of forty, a jury could reasonably have inferred that age animus motivated the Department's structuring of the RIP. While we note that in some instances statistical evidence comparing the age of those

employees terminated in a RIF with the age of those employees retained may be enough to "cause a reasonable trier of fact to raise an eyebrow," we do not believe such an inference is reasonably created in this case. MacDissi v. Valmont Indus. Inc., 856 F.2d 1054, 1058 (8th Cir. 1988) (trier of fact could reasonably infer that age animus played a role when two oldest employees in a department of nine were terminated in RIF, leaving only one employee over thirty-three years of age). Tuttle's evidence is analogous to that presented by the plaintiffs in Lewis, 114 F.3d 745. In Lewis, we held that, although evidence that Aerospace terminated three management employees, all over the age of fifty, was sufficient "additional evidence" to establish the plaintiffs prima facie case, it was insufficient as a matter of law to rebut Aerospace's nondiscriminatory explanations. Id. at 748-50. We find Lewis to be especially applicable to this case. The Department's nondiscriminatory explanation, that it decided to eliminate the entire class of employees who were considered the least flexible and whose work could be completed by cheaper, part-time employees, has not been rebutted by Tuttle's evidence that each member of the class was over the age of forty and treated in the exact same manner. Furthermore, Tuttle offers no other statistical evidence that the overall age of the Program's employees declined other than his own statement. See Tr. at 303. We find this insufficient as a matter of law to sustain the jury's verdict in this case.

Tuttle presented evidence at trial, in the form of several internal memoranda, that the Department's management was concerned that the RIF plan might result in age discrimination lawsuits. See App. at 29, 37, 39-40, 44-45, 53, 54. That an employer involved in a RIF which affected only protected employees would voice some concern over the possibility of litigation does not strike us as probative of whether the employer was motivated by age animus. In today's litigious society, "[i]t would be a

foolhardy supervisor indeed who, however well-documented and irrefutably established a termination decision might be, would not have some concern over possible litigation." Bashara v. Black Hills Corp., 26 F.3d 820, 824 (8th Cir. 1994).

Tuttle also points to a comment made by Ausfhal to Jeff Richter, a Grain Inspector II, regarding one of the terminated Grain Inspector Is, as evidence capable of raising a reasonable inference of age discrimination. According to Richter's deposition testimony, several months after the RIF occurred, Ausfual stated that one of the terminated Grain Inspector Is "wasn't capable of carrying the workload . . . [and] that we needed people that can handle the job." Appellant's Brief at 26-27. The jury did not hear this comment because the district court sustained the defendants' objection to the evidence as having no relevance to age. We similarly believe that the comment is not probative of age animus and does not support a reasonable inference of age discrimination.

Tuttle further alleges that the Department's failure to follow its own lay-off procedures gives rise to a reasonable inference of age discrimination. Tuttle, however presented no evidence that the Department actually failed to follow its own lay-off procedures. Tuttle contends that the part-time Grain Samplers and the full-time Grain Inspector Is should have been considered as one class of employees. Thus, Tuttle's argument goes, had the Department considered the two groups of employees as one class, the proper lay-off procedure would have been to terminate the part-time employees first. Tuttle presented no evidence, however, that the two groups actually were one class nor that the Department ever considered the two groups as one class. While evidence was presented that the Grain Samplers and the Grain Inspectors Is performed similar duties, no evidence exists to support Tuttle's assertions that the Grain Samplers and Grain Inspectors were a single class of

employees. Tuttle's belief that the two groups should have been classified together for lay-off purposes simply does make it reasonable to infer that the Department's consideration of the Grain Samplers and Grain Inspectors Is as two distinct classes for the purposes of the RIF was a pretext for age discrimination.

Tuttle contends that he presented sufficient evidence to demonstrate that the Department's proffered reason for the RIF, the poor financial condition of the Grain Inspection Program, was actually a pretext for age discrimination. Tuttle points to the fact that he was qualified for the position of Grain Inspector II and had more seniority and experience than some of the Grain Inspector Ils retained by the Department. As we have previously noted, we "may not second-guess an employer's personnel decisions, and we emphasize that employers are free to make their own business decisions, even inefficient ones, so long as they do not discriminate unlawfully" Hanebrink v. Brown Shoe Co., 110 F.3d 644, 646 (8th Cir. 1997); see also Bialas v. Greyhound Lines. Inc., 59 F.3d 759, 763 (8th Cir. 1995) (in RIF context, assumption of plaintiffs duties by younger person insufficient to establish prima facie case).

Tuttle's contention that the Department's poor financial condition was a pretext for unlawful age discrimination need not detain us long. Considerable evidence and numerous witnesses substantiated the Department's claim of financial problems within the Program. Indeed, Tuttle testified that he agreed with the statement that "there were financial problems in the Grain Inspection Program in 1995." Tr. at 297.Tuttle's allegation that the Program's financial woes were pretextual is, without more, insufficient to create a reasonable inference that age was a motivating factor in the RIF. See Krumweide, 116 F.3d at 364 (plaintiff's contention that employer did not suffer alleged financial woes is

unconvincing" given plaintiffs admission that there was need to minimize costs); Herrero, 109 F.3d at 485 (plaintiff's economic analysis that employer could have saved money by terminating higher paid employees rather than her does not constitute cognizable evidence of discrimination).

After a careful review of the record, we agree with the district court that the evidence presented by Tuttle was insufficient as a matter of law to support the jury's verdict.[11] Although viewed in the light most favorable to the jury's verdict, we cannot say that Tuttle presented evidence sufficient to create a reasonable inference that the defendants' nondiscriminatory explanation for the RIF was actually pretext for age discrimination. Accordingly, we affirm the district court's grant of JAML on Tuttle's ADEA claim.

B. SECTION 1983 CLAIM

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[11] Although Tuttle also points to other evidence (such as defendants' false promises to consider Tuttle for a promotion, defendants' cancellation of Tuttle's grain license test, and defendants' false promises to meet with the affected employees to discuss the RIF) which he alleges could create a reasonable inference of age discrimination, we find these contentions are without merit and warrant no further discussion.

On appeal, Tuttle also argues that the district court erred in granting JAML to the defendants on his § 1983[12] claim. Tuttle alleges that the Department terminated him after he spoke out on matters of public concern, thus violating his First Amendment rights. Tuttle contends that, as he presented sufficient evidence to establish the elements of a prima facie §1983 case, the district court's order was erroneous and should be reversed. We disagree.

In reviewing challenges to discharges based on alleged violations of an employee's freedom ofspeech rights, courts engage in a two-step analysis. See Tyler v. City of Mountain Homes, Arkansas, 72 F.3d 568, 569-70 (8th Cir. 1995). We must first determine whether the plaintiff established that he engaged in a protected activity. See Hamer v. Brown, 831 F.2d 1398, 1401 (8th Cir. 1987) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 569-72 (1968)). Speech which is constitutionally protected is that which can be "fairly characterized as constituting speech on a matter of public concern." Connick v. Myers, 461 U.S. 138, 146 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-48 (footnote omitted). If an employee's speech is found to involve a matter of public concern, courts must then balance the interest of the employee, as a citizen, with the interest of the state, as an employer. See Hamer, 831 F.2d at 1402; Tyler, 72 F.3d at 570. Both of these inquiries involve matters of law for the court to decide. See Dunn v. Carroll, 40 F.3d 287, 291 (8th Cir. 1994). Because we find that Tuttle has failed to

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[12]42 U.S.C. § 1983 provides that any person who, acting under the color of law, "subjects, or causes to be subjected, any citizen. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. §1983 (1994).

establish that his speech constituted a protected activity, we need not engage in the second step of the analysis.

Tuttle's testimony regarding the matters upon which he spoke out to Ausfhal and Saunders may best be described as sparse. On direct examination, Tuttle stated that he had spoken to Ausfhal about:

> The possibility of cutting back, how that was going to affect us. Why was it just us and not other parts at that time. And other matters about another employee who was wanting to take the grain test but he was color blind and to see if I heard if the defendant could give waivers on such cases if they could see and prove his color-blindness did not affect his ability to grade grain, that he could still see enough patterns to determine the, it wouldn't affect to grade the grain. [sic]

Tr. at 291. Upon cross-examination, Tuttle testified that his conversation with Ausfhal included topics such as: increases in salaries, promotions, safety issues.[13] See Tr. at 326-28.

While we cannot say, as a matter of law, that Tuttle's testimony is so lacking in specifics as to render us unable to determine whether his speech constituted protected activity, this is a close case. See Lesher v. Reed, 12 F.3d 148, 151 (8th Cir. 1994). We do hold, however, that Tuttle's speech does not constitute a protected activity. Tuttle was speaking out as an employee, not as a concerned citizen. See Connick, 461 U.S. at 147 ("when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision"). Although Tuttle argues that his mention of

[13] Tuttle never filed a grievance regarding any of the safety issues discussed with Ausfual. See Tr. at 328.

another worker illustrates that he was not concerned only with himself, we recently noted that "an employee speaking about internal practices relevant only to fellow employees" has not engaged in protected speech. Calvit v. Minneapolis Public Schools, 122 F.3d 1112, 1117 (8th Cir. 1997). As Tuttle failed to establish that he engaged in protected activity, we affirm the district court's court grant of JAML on the § 1983 claim.[14]

III. III. CONCLUSION

For the reasons set forth in this opinion, we affirm the judgment of the district court granting the defendants' motion for JAML on Tuttle's ADEA and § 1983 claims.

Affirmed.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[14] Our affirmance of the district court's order renders Tuttle's other claims of error on appeal moot.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 96-850-CV-W-8

ROBIN L. TUTTLE,
Plaintiff,

v.

MISSOURI DEPARTMENT OF
AGRICUL TURE, et al.,
Defendants.

ORDER

On October 23, 1997, a jury returned a verdict in this case. The jury found that defendant the Missouri Department of Agriculture ("Department") wilfully terminated plaintiff Robin Tuttle ("Tuttle") because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1-2) (1985). Further they found that defendant Ausfahl ("Ausfahl") terminated Tuttle's employment because Tuttle spoke out on matters of public concern in violation of 42 U.S.C. § 1983 (1994). A verdict was returned in favor of defendant John Saunders on the § 1983 claim against him.

Defendants moved for judgment as a matter of law at the close of the plaintiff's case and again at the close of all the evidence. The court took the motion made at the close of all the evidence under advisement and the case was submitted to the jury.

Before the court is the Department's and Ausfahl's renewed motion for judgment as a matter of law or, in the alternative, for a new trial pursuant to Rules 50 and 59 of

the Federal Rules of Civil Procedure (doc. # 104) and plaintiff's motion for award of attorney's fees and expenses (doc. # 105). For the reasons set forth more fully below, the court grants defendants' motion and denies plaintiff's motion.

Request for judgment as a matter of law

A party is entitled to judgment as a matter of law under Rule 50 "when all of the evidence points one way and is ' susceptible of no reasonable inference sustaining the position of the nonmoving party.'" Keenan v. Computer Assoc. Int'l. Inc.. 13 F.3d 1266, 1269 (8th Cir. 1994) (quoting White v. Pence. 961 F.2d 776, 779 (8th Cir. 1992)). In reviewing defendants' motion for judgment as a matter of law the court has 1) considered all the evidence presented in the light most favorable to Tuttle; 2) assumed that all conflicts in the evidence were resolved in favor of Tuttle; 3) assumed as proved all facts that Tuttle's evidence tended to prove; and 4) given Tuttle the benefit of all favorable inferences that may be reasonably drawn from the facts proved. Hopper v. Hallmark Cards, Inc., 87 F.3d 983, 988 (8th Cir. 1996) (citing First Dakota Nat'l Bank v. St. Paul Fire & Marine Ins. Co., 2 F.3d 801, 808 (8th Cir. 1993)). Nonetheless, the court finds that no reasonable jury could have returned verdicts in favor of Tuttle on the age discrimination claim against the Department and the § 1983 claim against Ausfahl. Accordingly, defendants' motion for judgment as a matter of law on these claims is granted.

Request for new trial

As an alternative to judgment as a matter of law, the Department and Ausfahl request a new trial Under these circumstances the court will make a conditional ruling on defendants' request for a new trial pursuant to Rule 50(c) of the Federal Rules of Civil Procedure. A request for a new trial may be granted pursuant to Rule 59 when the court is

convinced that the verdict or verdicts go "against the clear weight of the evidence or where a miscarriage of justice will result." Mears v. Nationwide Mut. Ins. Co., 91 F.3d 1118, 1123 (8th Cir 1996) (citing Benjamin v Aluminum Co. of Am., 921 F.2d 170, 173 (8th Cir. 1990)). As suggested above, the court is of the opinion that the verdicts returned against the Department on the age discrimination claim and Ausfahl on the § 1983 claim go against the clear weight of the evidence and amount to a miscarriage of justice. Therefore, if the judgment granted previously in this order is hereafter vacated or reversed, the court grants defendants' motion for a new trial.

Motion for attorney's fees

Tuttle moves this court for an award of attorney's fees and expenses on the grounds that he is the prevailing party in this case. Because defendants' motion for judgment as a matter of law or, in the alternative, for new trial has been granted, plaintiff is not the prevailing party in this action. Therefore Tuttle's motion for award of attorney's fees and expenses is denied.

ACCORDINGLY,

(1) defendants' motion for judgment as a matter of law (doc. # 104) is GRANTED;

(2) defendants' motion for a new trial (doc # 104) is CONDITIONALLY GRANTED; and

(3) plaintiff's motion for award of attorney's fees and expenses (doc # 105) is DENIED.

IT IS SO ORDERED.

Dated: January 29, 1998

/s/ Joseph E. Stevens, Jr.
United States District Judge

Title 29 Sec. 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;